

How to Evade the Constitution: The Hungarian Constitutional Court's Decision on Judicial Retirement Age, Part II

 verfassungsblog.de/evade-constitution-case-hungarian-constitutional-courts-decision-judicial-retirement-age-part-ii/

Kim Lane Scheppele Do 9 Aug 2012

Do 9 Aug
2012

Part Two: “The System Remains”

(Continued from [Part 1: The Decision](#))

On the question of remedies offered by the Court decision itself, the Constitutional Court engaged in what I’ve called elsewhere “[new judicial deference](#).” In practicing new judicial deference, a court makes a brave decision on the law but then fails to give the claimant any meaningful relief. The claimant wins big on principle. But if you are actually the claimant who brought the case seeking some change in your situation, you discover that you got only words. In the judicial retirement age case, the Court did not have the power to nullify all of the presidential orders through which the judges were fired, but it could have done so in the specific cases under review. The Court did not even do that. Those orders – and all of the others – still stand even while the law on which the orders were based has been voided. The Court provided no meaningful remedy in its opinion, not even to those directly involved in the case, even though it could have granted at least those judges some relief.

The judges’ actual fate in the retirement age dispute is important – and not just for the judges themselves. The lower retirement age has been a central element in [Orbán’s plan for remaking the judiciary](#). Introduced in the new pension law, which went into effect on 1 January, this sudden drop in the retirement age removed nearly 10% of all of the judges in the country in its first year in operation, giving the Orbán government the chance to name their replacements. Hungary’s judicial system, like most of the judiciaries in Europe, has a civil-service-style promotion system in which judges enter the system in lower posts and work their way up the promotion ladder as they age. So a cut in the retirement age decapitates the leadership structure. Fully one quarter of Supreme Court (Kuria) judges as well as nearly half of both the appeals court presidents and the county court presidents were among the nearly 300 judges removed from office this year.

The change in the retirement age occurred against a backdrop of broader institutional change in the ordinary judiciary. A newly created National Judicial Office (OBH), headed by a close friend of the Orbán family, now has the power to name judges virtually without constraint. And that office wasted no time selecting new recruits, who now start their judicial lives on probation, which means that true job security does not kick in for some time after the initial appointment. A probationary period before an appointment is final keeps judges on edge and attuned to the political environment in which they are judging if they want to keep their jobs. In the meantime, the head of the National Judicial Office moved up into higher ranks hand-picked sitting judges who now owe their premature advancement to Fidesz.

The Venice Commission (an expert body formally known as the European Commission for Democracy through Law) has been sharply critical of the whole plan for remaking the judiciary, saying that the changes “[not only contradict European standards for the organisation of the judiciary, especially its independence, but are also problematic as concerns the right to a fair trial](#).”

The European Commission has made the reorganization of the Hungarian judiciary one of its top issues in its ongoing struggle with the Hungarian government. It [started an infringement proceeding](#) at the European Court of

Justice, asserting that the suddenly changed retirement age violates European Union law. After the Constitutional Court's decision, the [European Commission asked the ECJ to expedite the case](#) which the ECJ has agreed to do. In the meantime, more than 100 of affected judges have [lodged complaints](#) with the European Court of Human Rights over the issue.

Against this background, the Constitutional Court decision appeared to put the brakes on the relentless drive of the Orbán government to control the judiciary. But once the law under which the judges have been fired has been struck down, what then? In his immediate reaction to the Constitutional Court decision, Prime Minister Orbán said defiantly that [“the system remains.”](#) In short – nothing about the judicial reorganization would change fundamentally as a result of the Court's decision.

Perhaps Orbán already knew that he did not have had to worry because the Court did not outline a clear path through which the fired judges could be returned to their jobs. The Court nullified only the part of the law on pensions that set the new retirement ages and not any presidential orders through which the judges had been fired. In an ideal world, national President János Áder should respond by withdrawing the orders to comply with the Court's decisions because the legal basis for those decisions has disappeared. But the president has so far refused to do to so.

Worse yet, there are signs that the Orbán government was tipped off to the decision of the Constitutional Court before it was made, as has occurred before. Back in December when the Constitutional Court issued three decisions against the Orbán program, the Orbán government acted preemptively, withdrawing one of the unconstitutional laws – which it then reenacted it after Court's jurisdiction to review it had lapsed. The government also amended the constitution to avoid the sting of another decision, putting the provision beyond the Court's further review. Only one of the Court's three December decisions, therefore, actually had any bite. In advance of the judicial retirement decision, the government also acted preemptively to avoid the most obvious consequences of the Court's decision. President Áder issued orders on 7 July prospectively firing all judges who would hit the retirement age through 31 December under the staged introduction of the new upper age limits. In short, Áder prospectively fired the last of the judges crucial to the Orbán plan right before the Court decision was handed down. And even though those newly fired judges are still in office now, Áder is refusing to retract the orders under which they were prospectively removed from their jobs.

In short, according to the President of Hungary, “the system remains.”

On 18 July, the [head of the National Judicial Office, Tünde Handó](#), responded to the Constitutional Court decision by telling the fired judges that they could appeal their individual dismissals through the labor courts. One would think that, since the law on the retirement age was the only reason for the judges' dismissals, labor courts would be able to reinstate them. But labor law experts are divided on the question of whether the labor courts have jurisdiction to rule on presidential orders. The law does not explicitly say that they can. Therefore, conservative judges may rule that they cannot, especially now that Handó has the unilateral power to reassign all of the labor court judges to worse jobs without having to give any reasons for doing so. If the labor court judges claim that they do not have the power to rule on presidential orders, then the fired judges will get nothing even though they won at the Constitutional Court.

But suppose that the labor courts do give the judges their jobs back. Handó issued a statement on 24 July that reassured the *new* judges hired and promoted in 2012 that, regardless of what the labor courts decide, the new judges would be able to keep their jobs. So even if the fired judges win their cases at the labor courts, they will not be reinstated to the same jobs they left, which have already been filled with Fidesz appointments. Instead, under the new judiciary acts, Handó will have the power to assign any reinstated judges wherever they are needed – which could well be to irrelevant courts in the boonies. Or they could go onto their old courts but be assigned no cases at all, because her appointees control the assignments of cases. In short, there is every sign that Handó intends to carry out Orbán's edict rather than the spirit of the Constitutional Court decision. And so, “the system remains.”

While the government bears the chief responsibility for failing to carry out the spirit of the Constitutional Court decision, this whole problem could have been avoided if the Constitutional Court had acted sooner. The reduction in the judicial retirement age was known long before 1 January, while the Constitutional Court still had the jurisdiction to rule on an abstract challenge to the law. Before the president started removing judges, then, the Court could have voided the pension law, which was already challenged before them in a petition to the Court. But the Court allowed the clock to run out on this power and the law went into effect 1 January.

Some of the fired judges challenged the law as soon as it came into force, using the new constitutional complaints procedure. There too, the Court could have acted quickly – but it did not. The Court has the power to suspend the operation of a potentially unconstitutional law pending a decision, before a law could cause more harm. But the Court did not invoke this power. The Court could also have decided the case quickly to prevent more judges from being fired. But instead, the Court waited an additional seven months as more and more judges were pushed off the bench.

By the time the Court issued this opinion on the last day of its term in July, 228 judges had already been removed from office with only 46 judges still left on the hit list in 2012. And, perhaps because he had been tipped off to the Court's judgment, President Áder issued the order firing the remaining 46 judges a week before the Court's decision became public. By the time the Court decided, then, all of the judges slated for immediate removal in 2012 were already fired and most of their replacements were already hired. Even a rule-of-law-respecting government would have been hard-pressed to come up with a solution that did not disrupt the careers of either the new or the old judges. This disaster – waiting until the damage was done before issuing a ruling – lies at the feet of the Constitutional Court, which could have stopped the judicial firings before they ever occurred. The Constitutional Court, in short, practiced, “new judicial deference” to the detriment of the fired judges –and so to the independence of the judiciary as a whole.

So who won in the judicial retirement age decision? Perhaps Viktor Orbán won the biggest victory of all. He can now say to his critics that he has an independent Constitutional Court, one that is prepared to rule against him on crucial elements of his program. But the decision came too late to make any difference to the composition of the judiciary. In fact, Orbán's first reaction to the Court decision is the one that has been carried out by all of the officials of his government. Despite the Constitutional Court's ruling, “the system remains.”

By KIM LANE SCHEPPELE



Part Two: “The System Remains”

(Continued from [Part 1: The Decision](#))

On the question of remedies offered by the Court decision itself, the Constitutional Court engaged in what I've called elsewhere “[new judicial deference](#).” In practicing new judicial deference, a court makes a brave decision on the law but then fails to give the claimant any meaningful relief. The claimant wins big on principle. But if you are actually the claimant who brought the case seeking some change in your situation, you discover that you got only words. In the judicial retirement age case, the Court did not have the power to nullify all of the presidential orders through which the judges were fired, but it could have done so in the specific cases under review. The Court did not even do that. Those orders – and all of the others – still stand even while the law on which the orders were based has been voided. The Court provided no meaningful remedy in its opinion, not even to those directly involved in the case, even though it could have granted at least those judges some relief.

The judges' actual fate in the retirement age dispute is important – and not just for the judges themselves. The lower retirement age has been a central element in [Orbán's plan for remaking the judiciary](#). Introduced in the new

pension law, which went into effect on 1 January, this sudden drop in the retirement age removed nearly 10% of all of the judges in the country in its first year in operation, giving the Orbán government the chance to name their replacements. Hungary's judicial system, like most of the judiciaries in Europe, has a civil-service-style promotion system in which judges enter the system in lower posts and work their way up the promotion ladder as they age. So a cut in the retirement age decapitates the leadership structure. Fully one quarter of Supreme Court (Kuria) judges as well as nearly half of both the appeals court presidents and the county court presidents were among the nearly 300 judges removed from office this year.

The change in the retirement age occurred against a backdrop of broader institutional change in the ordinary judiciary. A newly created National Judicial Office (OBH), headed by a close friend of the Orbán family, now has the power to name judges virtually without constraint. And that office wasted no time selecting new recruits, who now start their judicial lives on probation, which means that true job security does not kick in for some time after the initial appointment. A probationary period before an appointment is final keeps judges on edge and attuned to the political environment in which they are judging if they want to keep their jobs. In the meantime, the head of the National Judicial Office moved up into higher ranks hand-picked sitting judges who now owe their premature advancement to Fidesz.

The Venice Commission (an expert body formally known as the European Commission for Democracy through Law) has been sharply critical of the whole plan for remaking the judiciary, saying that the changes [“not only contradict European standards for the organisation of the judiciary, especially its independence, but are also problematic as concerns the right to a fair trial.”](#)

The European Commission has made the reorganization of the Hungarian judiciary one of its top issues in its ongoing struggle with the Hungarian government. It [started an infringement proceeding](#) at the European Court of Justice, asserting that the suddenly changed retirement age violates European Union law. After the Constitutional Court's decision, the [European Commission asked the ECJ to expedite the case](#) which the ECJ has agreed to do. In the meantime, more than 100 of affected judges have [lodged complaints](#) with the European Court of Human Rights over the issue.

Against this background, the Constitutional Court decision appeared to put the brakes on the relentless drive of the Orbán government to control the judiciary. But once the law under which the judges have been fired has been struck down, what then? In his immediate reaction to the Constitutional Court decision, Prime Minister Orbán said defiantly that [“the system remains.”](#) In short – nothing about the judicial reorganization would change fundamentally as a result of the Court's decision.

Perhaps Orbán already knew that he did not have had to worry because the Court did not outline a clear path through which the fired judges could be returned to their jobs. The Court nullified only the part of the law on pensions that set the new retirement ages and not any presidential orders through which the judges had been fired. In an ideal world, national President János Áder should respond by withdrawing the orders to comply with the Court's decisions because the legal basis for those decisions has disappeared. But the president has so far refused to do so.

Worse yet, there are signs that the Orbán government was tipped off to the decision of the Constitutional Court before it was made, as has occurred before. Back in December when the Constitutional Court issued three decisions against the Orbán program, the Orbán government acted preemptively, withdrawing one of the unconstitutional laws – which it then reenacted it after Court's jurisdiction to review it had lapsed. The government also amended the constitution to avoid the sting of another decision, putting the provision beyond the Court's further review. Only one of the Court's three December decisions, therefore, actually had any bite. In advance of the judicial retirement decision, the government also acted preemptively to avoid the most obvious consequences of the Court's decision. President Áder issued orders on 7 July prospectively firing all judges who would hit the retirement age through 31 December under the staged introduction of the new upper age limits. In short, Áder prospectively fired the last of the judges crucial to the Orbán plan right before the Court decision was handed down. And even

though those newly fired judges are still in office now, Áder is refusing to retract the orders under which they were prospectively removed from their jobs.

In short, according to the President of Hungary, “the system remains.”

On 18 July, the [head of the National Judicial Office, Tünde Handó](#), responded to the Constitutional Court decision by telling the fired judges that they could appeal their individual dismissals through the labor courts. One would think that, since the law on the retirement age was the only reason for the judges’ dismissals, labor courts would be able to reinstate them. But labor law experts are divided on the question of whether the labor courts have jurisdiction to rule on presidential orders. The law does not explicitly say that they can. Therefore, conservative judges may rule that they cannot, especially now that Handó has the unilateral power to reassign all of the labor court judges to worse jobs without having to give any reasons for doing so. If the labor court judges claim that they do not have the power to rule on presidential orders, then the fired judges will get nothing even though they won at the Constitutional Court.

But suppose that the labor courts do give the judges their jobs back. Handó issued a statement on 24 July that reassured the *new* judges hired and promoted in 2012 that, regardless of what the labor courts decide, the new judges would be able to keep their jobs. So even if the fired judges win their cases at the labor courts, they will not be reinstated to the same jobs they left, which have already been filled with Fidesz appointments. Instead, under the new judiciary acts, Handó will have the power to assign any reinstated judges wherever they are needed – which could well be to irrelevant courts in the boonies. Or they could go onto their old courts but be assigned no cases at all, because her appointees control the assignments of cases. In short, there is every sign that Handó intends to carry out Orbán’s edict rather than the spirit of the Constitutional Court decision. And so, “the system remains.”

While the government bears the chief responsibility for failing to carry out the spirit of the Constitutional Court decision, this whole problem could have been avoided if the Constitutional Court had acted sooner. The reduction in the judicial retirement age was known long before 1 January, while the Constitutional Court still had the jurisdiction to rule on an abstract challenge to the law. Before the president started removing judges, then, the Court could have voided the pension law, which was already challenged before them in a petition to the Court. But the Court allowed the clock to run out on this power and the law went into effect 1 January.

Some of the fired judges challenged the law as soon as it came into force, using the new constitutional complaints procedure. There too, the Court could have acted quickly – but it did not. The Court has the power to suspend the operation of a potentially unconstitutional law pending a decision, before a law could cause more harm. But the Court did not invoke this power. The Court could also have decided the case quickly to prevent more judges from being fired. But instead, the Court waited an additional seven months as more and more judges were pushed off the bench.

By the time the Court issued this opinion on the last day of its term in July, 228 judges had already been removed from office with only 46 judges still left on the hit list in 2012. And, perhaps because he had been tipped off to the Court’s judgment, President Áder issued the order firing the remaining 46 judges a week before the Court’s decision became public. By the time the Court decided, then, all of the judges slated for immediate removal in 2012 were already fired and most of their replacements were already hired. Even a rule-of-law-respecting government would have been hard-pressed to come up with a solution that did not disrupt the careers of either the new or the old judges. This disaster – waiting until the damage was done before issuing a ruling – lies at the feet of the Constitutional Court, which could have stopped the judicial firings before they ever occurred. The Constitutional Court, in short, practiced, “new judicial deference” to the detriment of the fired judges –and so to the independence of the judiciary as a whole.

So who won in the judicial retirement age decision? Perhaps Viktor Orbán won the biggest victory of all. He can now say to his critics that he has an independent Constitutional Court, one that is prepared to rule against him on crucial elements of his program. But the decision came too late to make any difference to the composition of the

judiciary. In fact, Orbán's first reaction to the Court decision is the one that has been carried out by all of the officials of his government. Despite the Constitutional Court's ruling, "the system remains."

LICENSED UNDER CC BY NC ND

SUGGESTED CITATION Schepppele, Kim Lane: *How to Evade the Constitution: The Hungarian Constitutional Court's Decision on Judicial Retirement Age, Part II*, *VerfBlog*, 2012/8/09, <http://verfassungsblog.de/evade-constitution-case-hungarian-constitutional-courts-decision-judicial-retirement-age-part-ii/>.